APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED SEPTEMBER 30, 2009

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 09-0021-CV

ARIEL FRIEDLANDER,

Plaintiff-Appellant,

-v.-

PORT JEWISH CENTER,

Defendant-Appellee.

Present BARRINGTON D. PARKER, and RICHARD C. WESLEY, Circuit Judges, JANE A. RESTANI,* Judge.

SUMMARY ORDER

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the district court judgment is AFFIRMED.

Ariel Friedlander appeals from a judgment of the United States District Court for the Eastern District of New York (Spatt, *J.*). The district court dismissed

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* The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

Appendix A

Friedlander's claims against Port Jewish Center ("the Temple") arising from the Temple's termination of her as its rabbi. Citing the "ministerial exception," a constitutional doctrine that forbids courts from disturbing the autonomy of religious institutions over ecclesiastical affairs and from entangling themselves in religious questions, *see Rweyemamu v.. Cote*, 520 F.3d 198, 204-09 (2d Cir.2008), the district court determined that it lacked subject matter jurisdiction. Friedlander now contends that dismissal pursuant to the ministerial exception was inappropriate because the district court's analysis of her claims would not have required it to examine religious issues. We assume the parties' familiarity with the facts, procedural history of the case, and issues presented on appeal.

This Court reviews *de novo* a decision to grant a motion to dismiss for lack of subject matter jurisdiction. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir.2000). "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Id.*

In *Rweyemamu*, we held that a plaintiff-minister's race discrimination suit against a diocese was barred by the ministerial exception because reviewing the minister's claim would have required the district court to assess the plausibility of the diocese's contention that it fired the priest due to his inadequate performance of his pastoral duties. *Rweyemamu*, 520 F.3d at 209. We held that such a review "easily falls within" the

boundaries of the ministerial exception. *Id.; see also Minker v. Baltimore Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1357 (D.C.Cir.1990) ("[E]valuation of the 'gifts and graces' of a minister must be left to ecclesiastical institutions.").

Similarly, review of Freidlander's claims in this case would require scrutiny of whether she should have, *inter alia*, read more extensively from the Torah at certain services, prepared students for their Bar or Bat Mitzvah more adequately, performed certain pastoral services that were not performed, or followed the Temple's funeral service policies. A reviewing court would also be required to assess whether any failures rose to the level of "gross misconduct or willful neglect of duty" under the relevant employment contract. We agree with the district court that such review would involve impermissible judicial inquiry into religious matters.

For the foregoing reasons, the decision is AFFIRMED.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: Franklin Perry

APPENDIX B — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED DECEMBER 8, 2008

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

07-CV-5253 (ADS)(ETB)

ARIEL FRIEDLANDER,

Plaintiff,

-against-

PORT JEWISH CENTER,

Defendant.

MEMORANDUM OF DECISION AND ORDER

SPATT, District Judge.

On December 17, 2007, Rabbi Ariel Friedlander ("the Plaintiff") commenced this lawsuit against her former employer, the Port Jewish Center ("the Defendant" or "the Temple"), alleging that, in terminating her, the Defendant violated the terms of her contract and the covenant of good faith and fair dealing. The Defendant has moved to dismiss the Plaintiff's complaint under Fed.R.Civ.P. 12(b)(1) on the ground that the First Amendment precludes the Court

from exercising subject matter jurisdiction over the Plaintiff's claims. For the reasons that follow, the Defendant's motion to dismiss is granted.

I. BACKGROUND

The following facts are drawn from the Plaintiff's complaint and the documents that were incorporated by specific reference therein. The Plaintiff entered into a contract with the Defendant in May of 2005 to serve as the Temple's rabbi for a period of three years. The contract provided that the Plaintiff would perform "all the customary and usual duties of rabbis of Reform Congregations of the Union of Reform Judaism." In particular, the contract specified that the Plaintiff was expected to carry out various spiritual and administrative duties that included holiday and worship services; life cycle events; educational functions; pastoral functions; temple and other community functions; membership functions; and administrative functions.

The contract also provided that "the Rabbi shall have freedom of the pulpit," and indicated that the Temple could terminate the Plaintiff's contract only "for gross misconduct or willful neglect of duty." The Plaintiff alleges that some of the Temple's congregants raised objections to changes the Plaintiff made to Bar Mitzvah and Bat Mitzvah services. On or about March 6, 2006, a group of congregants attended a meeting of the Temple's Board of Trustees to air their complaints about the Plaintiff. According to the Plaintiff, one of those congregants, John Helfat, told the Board that if they

did not fire the Plaintiff, he and others would leave the congregation.

On or about July 5, 2006, Sandy Ehrlich, the Temple President, sent the Plaintiff an email cataloguing a list of grievances. This extensive list of grievances included, among other issues, the congregants' dissatisfaction with: (i) the Plaintiff's infrequent readings of the Torah; (ii) the quantity and variety of liturgical music selected for religious services; (iii) changes made to the Bar Mitzvah and Bat Mitzvah services; (iv) the Plaintiff's funeral service policies; (v) the Plaintiff's inability to work with religious instructors and the Cantor; (vi) the Plaintiff's neglect of her pastoral functions; (vii) the Temple's attrition rates under her leadership; and (viii) the number of hours the Plaintiff dedicated to administrative functions. Ehrlich's email indicated that she was sending the Plaintiff the list in order to give the Plaintiff an opportunity to prepare a presentation for a meeting with the Board of Trustees on the following day.

However, the Plaintiff did not attend the July 6th Board of Trustees meeting. On July 9, 2006, the Plaintiff received a letter from the Temple stating that the Board of Trustees had voted unanimously to recommend that her contract be terminated. The Plaintiff avers that, on or about August 2, 2006, the Temple officially terminated her contract. In December of 2007, the Plaintiff commenced this lawsuit alleging that the Defendant's proffered reasons for her firing did not constitute just cause under the contract because she did not commit

"gross misconduct" or "willful neglect". The Defendant moved to dismiss the complaint in or about March of 2008 on the ground that the Religion Clauses of the First Amendment preclude the Court from reviewing the Plaintiff's firing.

The Defendant's reply memorandum in support of the motion to dismiss set off an additional round of motion practice addressing whether the Court could consider "new material" introduced by the Defendant in its reply. Because the Court will not consider or rely upon the "new material" in deciding this motion, it is unnecessary to address the Plaintiff's motion to strike portions of the Defendant's reply.

II. DISCUSSION

A. 12(b)(1) Standard

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. U.S.*, 201 F.3d 110, 113 (2d Cir.2000). The standard for reviewing a 12(b)(1) motion to dismiss is essentially identical to the 12(b)(6) standard, except that "[a] plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova*, 201 F.3d at 113. When considering a motion to dismiss for lack of subject matter jurisdiction, the Court may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional

question. *See Robinson v. Gov't of Malaysia*, 269 F.3d 133, 141 n. 6 (2d Cir.2001).

B. The Defendant's Motion to Dismiss

The Plaintiff argues that the Defendant's proffered reasons for her firing did not constitute just cause under the contract because she did not commit "gross misconduct" or "willful negligence". The Plaintiff also asserts a common law claim that the Defendant's breached the covenant of good faith and fair dealing by "fabricat[ing] and exaggerat[ing] situations they thought would constitute gross misconduct and willful neglect." The Defendant counters that the "ministerial exception" precludes the Court from exercising subject matter jurisdiction over the Plaintiff's claims.

"Since at least the turn of the century, courts have declined to 'interfere [ ] with ecclesiastical hierarchies, church administration, and appointment of clergy.' " *Rweyemamu v. Cote*, 520 F.3d 198, 204-5 (2d Cir.2008) (citing *Minker v. Balt. Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1357 (D.C.Cir.1990)). In recognizing a ministerial exception to the jurisdiction of the federal courts, some courts have invoked the "right to church autonomy secured by the Free Exercise Clause," while "[o]thers have emphasized that taking sides in a religious dispute would lead an Article III court into excessive entanglement in violation of the Establishment Clause." *Rweyemamu*, 520 F.3d at 205 (citations omitted). Although the textual source of the ministerial exception may be unsettled, *Rweyemamu*

confirms "the vitality of [this] doctrine in the Second Circuit." *Id.* at 207.

In *Rweyemamu*, the plaintiff, a Catholic priest, alleged that his for cause termination—predicated upon his poor performance and negative attitude—was merely a pretext for race-based discrimination. *Id.* at 200. The Second Circuit found that the ministerial exception precluded the Court from exercising jurisdiction because of the "pervasively religious" nature of the ordained priest's duties and because an inquiry into his claims would have entangled the Court in Catholic doctrine. *Id.* at 209. In particular, the Court explained that the Plaintiff's discrimination claim required him to show that the church's proffered reasons for his firing were pretextual; an argument that would necessarily require the Court to "assess the quality" of his sermons and determine whether he was "insufficiently devoted to the ministry." *Id.*

As the Plaintiff points out, the ministerial exception plainly does not create for religious institutions a charmed existence free from liability for "their torts and upon their valid contracts." *Id.* (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir.1985)). However, the Free Exercise Clause does protect a " 'church's right to decide matters of governance and internal organization.' " *Id.* at 208 (citing *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3d Cir.2006)). "The more 'pervasively religious' the relationship between an employee and his employer, the more salient the free exercise concern becomes."

Rweyemamu, 520 F.3d at 208. Here, it is undisputed that, as a Rabbi, the Plaintiff exercised a pervasively religious function. The Plaintiff argues instead that this is a purely secular contract case that would not require the Court to entangle itself in religious doctrine. The Court disagrees.

"The Establishment Clause forbids 'excessive government entanglement with religion.' " *Rweyemamu*, 520 F.3d at 208 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 613, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)). The Second Circuit teaches that certain claims, regardless of their "emblemata," may "inexorably entangle [the courts] in doctrinal disputes." *Id.* at 208 (citing *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir.1989)). In this sense, the fact that the Plaintiff asserts causes of action sounding in violations of state contract law does not alter the Court's analysis. *See Kraft v. Rector, Churchwardens & Vestry of Grace Church in New York*, 2004 WL 540327, at *4 (S.D.N.Y. Mar. 17, 2004) (finding that "although the instant suit asserts common law claims, rather than federal statutory claims, the same constitutional principle applies to both, and bars court review of church decisions regarding the employment of ministers.").

Here, adjudicating the Plaintiff's claim would, as in *Rweyemamu*, necessarily require the Court to review the Plaintiff's performance of her rabbinical duties. This is precisely the type of inquiry that the First Amendment prohibits. The Plaintiff's duties included, among other things, selecting readings from the Torah,

and establishing policies for funeral services as well as Bar Mitzvah and Bat Mitzvah services. These are purely religious matters in which the Court may not interfere. *See Rweyemamu*, 520 F.3d at 207 (finding that the Court "will not subject to examination the genuineness of a proffered religious reason for an employment action") (emphasis added).

Nevertheless, the Plaintiff urges the Court to exercise its "powers of equity" to find that the Defendant breached the covenant of good faith and fair dealing. However, this argument misapprehends the nature of the Court's jurisdiction. Having found that the Court lacks subject matter jurisdiction over the Plaintiff's claims, the Court is powerless to grant the Plaintiff any form of relief. Accordingly, the Plaintiff's complaint must be dismissed.

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED, that the Defendant's motion to dismiss the Plaintiff's complaint is granted, and it is further

ORDERED, that the Clerk of the Court is directed to close the case.

SO ORDERED.

Appendix B

Dated: Central Islip, New York
December 8, 2008

s/ Arthur D. Spatt
ARTHUR D. SPATT
United States District Judge